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No. 95-215

In The

Supreme Court Of The United States

Supreme Court, U.S.
FILED
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OCTOBER TERM, 1995

SANDRA K. HUGHES,
Petitioner,

v.

MORRIS BEDSOLE, both individually and in his official capacity as Sheriff of Cumberland County, North Carolina; **JAMES D. BOWSER**, both individually and in his official capacity as Major of the Cumberland County Sheriff's Department; **CUMBERLAND COUNTY SHERIFF'S DEPARTMENT, CUMBERLAND COUNTY, NORTH CAROLINA**, and the **WESTERN SURETY COMPANY, INCORPORATED,**
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

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32 pp

Questions Presented by Petitioner

I. When presented with a prima facie case of sex discrimination and a prima facie case of First Amendment retaliatory discharge, may a public employer defendant meet its burden to articulate a legitimate, non-discriminatory reason(s) for its disparate disciplinary treatment and discharge of a plaintiff solely by the appellate argument of its counsel where the record does not contain any admissible evidence in which the employer sets forth the alleged non-discriminatory reason(s) for that disparate treatment?

II. Does a public employee and female plaintiff have a cause of action under the Fourteenth Amendment and 42 U.S.C. §1983 against a local governmental employer for employment discrimination on the basis of sex that is independent of any remedies or rights that may exist under Title VII of the Civil Rights Act of 1964?

III. Is there any material difference between the standard of proof and allocation of proof that a public employee must meet or articulate to demonstrate a prima facie case of retaliatory discharge in violation of 42 U.S.C. §2000e-3(a) of the Civil Rights Act of 1964, and the burden of proof and allocation of proof that a public employee must meet or articulate to demonstrate a prima facie case of retaliatory discharge in violation of the First Amendment?

IV. With respect to claims of sex discrimination and First Amendment retaliatory discharge, may a public employee and female plaintiff meet her burden to demonstrate a genuine issue of material fact as to her employer's retaliatory and discriminatory intent with respect to her discharge by production of evidence of disparate disciplinary treatment for which her employer did not articulate any legitimate, non-discriminatory reasons) that was submitted as admissible evidence in the record of the case?

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STATEMENT OF THE CASE

A. INTRODUCTION

Petitioner has misstated the actions taken by the U.S.

District Court and the United States Court of Appeals for the Fourth Circuit in this matter. The respondent's original motion for summary judgment did not include a request for summary judgment upon the petitioner's free speech claim and sex discrimination claim. However, Judge Dupree raised these issues sua sponte at the hearing. Judge Dupree placed the petitioner on notice that he was raising the issues sua sponte, and offered the petitioner additional time to come forward with any other evidence that she had. The petitioner neither accepted this offer of additional time nor elected to submit any evidence other than that evidence the parties had already placed before the Court. The petitioner merely expressed the opinion that Judge Dupree was precluded from dealing with these issues sua sponte.

The petitioner suggests that Judge Dupree's decision on her free speech retaliation claim and her sex discrimination claim was based solely upon certain legal arguments. To the

contrary, Judge Dupree considered the factual evidence before him, and determined that the evidence was inadequate. The Fourth Circuit held that the District Court acted appropriately by properly putting the petitioner on notice that it would consider the issues sua sponte, and offering the petitioner additional time to produce any evidence she had.

The petitioner has indicated that the Fourth Circuit affirmed the District Court's decision on grounds other than those upon which the District Court had relied with respect to these two claims. Her statement is misleading. With respect to the sex discrimination claim, Judge Dupree concluded that the petitioner had simply presented no evidence from which a reasonable jury could find in her favor. When the petitioner subsequently filed a motion with the District Court requesting that it alter or amend its judgment, both the petitioner and respondent submitted additional evidence. The District Court declined to consider any of the additional evidence that was

submitted. In her appeal to the Fourth Circuit, the petitioner elected to include this additional evidence for the Court's consideration. The Fourth Circuit considered this evidence, and relied upon it as an additional basis for upholding the District Court's action.

With respect to the free speech retaliation claim, the District Court concluded that the petitioner's speech did not involve a matter of public concern under the first step established by this Court in Connick v. Myers, 461 U.S. 138 (1983). The Fourth Circuit, on the other hand, reviewed the evidence and determined that it was not necessary to address the issue of whether the petitioner's speech involved a matter of public concern. Instead, the Fourth Circuit held that the petitioner's evidence did not raise a genuine issue of material fact indicating that her speech was a substantial or motivating factor behind her discharge.

The petitioner incorrectly portrays this case as one that

includes important public interest considerations. She suggests that her case raises extremely important issues affecting thousands of public employees across the country. A brief review of the decisions of the courts below indicates that she is mistaken.

The District Court in referring to the petitioner's free speech claims states: "The definite impression here is that the Plaintiff was simply grousing about the conditions of her employment, a matter in which at best the public would have had only limited interest." App. to Petition, p. 44A. With respect to the petitioner's claim that she has a disabling condition, the District Court stated:

> Plaintiff has made no showing that she has any such disability. On the contrary, she has alleged that she is fully capable of performing the duties which were assigned to her in the jail and when she was on the road patrol.

App. to Petition, p. 48A.

The Fourth Circuit noted in its opinion that there was

clear evidence that undercut the petitioner's evidence that she was the victim of sex discrimination; namely the evidence that another female staff sergeant was also treated more leniently than the petitioner. As for the petitioner's evidence that a male sergeant received less punishment for security violations, the Fourth Circuit stated:

> Hughes thus offers no evidence that the specific factual circumstances surrounding her security violations, as well as her overall performance at that time, were substantially similar to those of the male shift sergeant whom she cites as having received more favorable treatment.

App. to Petition, p. 20A.

Both the District Court and the Fourth Circuit were unable to find any merit whatsoever to the petitioner's claims since she failed to produce any evidence to support those claims. Her particular situation does not raise any issues of great importance to public employees.

B. FACTS

The petitioner has included misleading statements and

misstatements of fact in her petition. The petitioner indicates that her auto accident while working on the road patrol left her with a permanent injury to her arm that restricted the type of work that Hughes could perform. On the contrary, the condition which she describes did not restrict her from performing work. She was able to return to the road patrol without restrictions, and did so for an extended period of time until she was promoted to sergeant and reassigned to jail duty. She was also able to perform all of the requirements of the job as a shift supervisor in the jail. Her condition, more commonly known as "tennis elbow," would bother her from time to time, but never prevented her from performing her job.

Petitioner fails to mention that Sheriff Bedsole established the position of Chaplain for the Cumberland County Sheriff's Department ("CCSD") for the purpose of helping employees, in a confidential manner, with problems they might be having. There was no chain of command with respect to the

Chaplain. Any employee could talk with the Chaplain about problems or concerns without having to discuss those same problems or concerns with their immediate supervisor.

The petitioner briefly mentions Sheriff Bedsole's "open door" policy. Any employee, including the petitioner, was welcome to come see him about a problem. In fact, Sheriff Bedsole invited Chaplain Mitchell and the petitioner to come talk with him about the petitioner's concerns. Sheriff Bedsole indicated that he understood her concerns about not having enough people in the jail, but that his hands were tied until he could get the County Commission to approve the new budget which included additional positions. There is no evidence that Sheriff Bedsole was upset with what the petitioner had to say, or with the fact that she met with Chaplain Mitchell and with him to discuss the matter. There is no evidence that her speech had anything to do with her discharge. Although she was discharged shortly after her conference with Sheriff Bedsole

and Chaplain Mitchell, there was also another security violation by her shortly after this conference which brought about her dismissal.

There were several reasons why the petitioner was discharged. Among those reasons, she was responsible for serious security violations. She was also having a number of other performance problems. Officer Leroy Park indicated that she was always complaining to others about the jail and that her attitude had turned sour against the CCSD. In addition, the petitioner herself admitted having some problems with her supervisor Major Bowser, and on one occasion telling him that "he could take her job and shove it". The petitioner claims that her comment to Bowser, her mistreatment of her subordinates, her negative attitude toward Bowser and the jail, her derogatory comments about Bowser to others, and complaints from her subordinates about her had no bearing on her being fired. The District Court and the Fourth Circuit concluded

otherwise.

The petitioner places a great deal of emphasis upon an alleged statement that Sheriff Bedsole gave to the EEOC. This statement consists of notes that were made by the EEOC investigator during a lengthy meeting she had with Sheriff Bedsole. Sheriff Bedsole never reviewed or signed the notes prepared by the EEOC investigator. At the request of the petitioner, the investigator later signed an affidavit indicating that she had no specific recollection of her meeting with Sheriff Bedsole or what he said, but she knew her notes must be accurate. Sheriff Bedsole did prepare a separate signed statement explaining all of the reasons why he fired the petitioner rather than consider her for a transfer or demotion back to a road patrol position. Those reasons included the security violations, numerous problems getting along with staff in the jail, poor working relations with her supervisors, and actions she took which were disruptive to the operation of the

jail. Sheriff Bedsole's signed statement was submitted by the petitioner to the Fourth Circuit and considered by that Court.

The petitioner's own evidence demonstrates that both male and female employees were treated more leniently than she was for security violations. In one such incident, Officer Durden (female) was working under shift supervisor Sgt. Marsha Hutchison when Durden was responsible for a security violation. Durden received a one-day suspension, and Sgt. Hutchison received no disciplinary action. In another situation, Officer Susan Hollis received a one-day suspension for a security violation. The petitioner received a three-day suspension for the March 16, 1989 security violation. Each case was considered on its own merits. As the circumstances varied, the discipline varied.

C. THE DISTRICT COURT'S OPINION

The petitioner mischaracterizes how the District Court framed the sex discrimination and free speech retaliation issues.

The District Court found that petitioner's speech in this case did not involve a matter of public concern, and there was a lack of any evidence of any animus on the part of the Sheriff relating to her speaking with Chaplain Mitchell outside the alleged chain of command.

The District Court's finding that there was no evidence in the record from which a reasonable jury could find that the respondent was discharged because she was a woman, was based upon the petitioner's failure to produce any meaningful evidence. In commenting upon the petitioner's claim of denial of equal protection, the District Court mentions the extent of the evidence - "an instance in which a male employee of the Sheriff's Department was given less severe disciplinary action for the same offense for which she was disciplined and later discharged." App. to the Petition at p. 45A. This incident was one of the incidents involving a security violation on Sgt. Park's shift that is cited by the petitioner.

D. THE FOURTH CIRCUIT'S OPINION

The Fourth Circuit made a de novo determination of all of the evidence that was before the District Court, including the additional evidence submitted by the petitioner requesting that the District Court alter or amend its judgment. The Fourth Circuit applied the proper standard for review of a summary judgment order.

In a footnote, the Fourth Circuit mentioned that it did not address the petitioner's claims of sex discrimination under the 14th Amendment and 42 U.S.C. §1983 because her 14th Amendment claim merges into her §1983 claim and she cannot bring an action under §1983 because she had originally instituted a Title VII cause of action. Even if this portion of the Fourth Circuit's opinion is incorrect as the petitioner claims, it merely constitutes harmless error. The Fourth Circuit went on to fully evaluate all of the evidence Hughes presented regarding her sex discrimination claims, and decided that she

had established a prima facie case. However, upon review of all of the evidence including respondents' proffered reasons for the discipline and discharge of the petitioner, the Court concluded there was no genuine issue of material fact indicating that the reasons given by the respondents were a pretext for discrimination.

In arriving at its decision regarding the petitioner's free speech claims, the Fourth Circuit relied upon the undisputed evidence in addition to the arguments of counsel for the respondents. App. to the Petition, pp. 25A-27A. The Fourth Circuit concluded that since there was no direct evidence of retaliatory intent, Hughes could not rely solely on the temporal connection between her alleged free speech and her discharge, together with her evidence that a male sergeant (who did not exercise any free speech rights) was not punished as severely as she was for security violations.

EXPLANATION OF OPPOSITION TO PETITIONER'S REASONS FOR REQUESTING THE WRIT

I. THE OPINION OF THE FOURTH CIRCUIT DOES NOT CONFLICT WITH THE PRIOR DECISION OF THIS COURT IN TEXAS DEPARTMENT OF COMMUNITY AFFAIRS V. BURDINE, 450 U.S. 248 (1981) OR OTHER CIRCUIT COURT DECISIONS; AND FURTHERMORE, PETITIONER IS PRECLUDED FROM RAISING THIS ISSUE BECAUSE SHE FAILED TO RAISE IT IN THE COURT BELOW.

The petitioner simply failed to raise this issue in her appeal to the Fourth Circuit; that the respondents' rebuttal evidence to her prima facie proof of discrimination or retaliation was based on facts that were not in evidence. The petitioner failed to address this argument to the Fourth Circuit, and thus is precluded from raising it at this point. Except in

exceptional circumstances, where issues are neither raised before nor considered by the Court of Appeals, the Supreme Court will refuse to consider them. Lawn v. United States, 355 U.S. 339, 362-363, footnote 16 (1958); Adickes v. Kress and Co., 398 U.S. 144, 148, footnote 2 (1970).

Furthermore, the Fourth Circuit followed the law established by this Court in Burdine. The Fourth Circuit considered admissible evidence in the form of deposition testimony and written statements. Contrary to the assertions of the petitioner, the Fourth Circuit did not rely upon the contentions of respondents' counsel in appellate oral arguments and briefing. Among other things, this admissible evidence included the statement of Sheriff Bedsole, and the notes of the EEOC investigator that both include legitimate, non-discriminatory reasons for her termination. Other evidence includes the testimony of Sgt. Park about Hughes turning sour against the department and constantly complaining to others

about the jail. The Fourth Circuit mentions this evidence in its opinion (App. to Petition, p. 9A), and also notes the differences in the factual situations surrounding her security violations as compared to the alleged security violations committed by a male sergeant (App. to Petition, p. 20A). The Fourth Circuit considered this admissible evidence to be legally sufficient to justify a judgment for the respondents, once again following this Court's mandate in Burdine.

Both the District Court and the Fourth Circuit provided the petitioner the opportunity to submit evidence that these legitimate reasons proffered by the respondent were not true reasons but mere pretext for discrimination. In St. Mary's Honor Center v. Hicks, 113 S.Ct. 2842 (1993), this Court indicated that a reason cannot be proved to be "a pretext for discrimination" unless it is shown both that the reason was false and that discrimination was the real reason. The petitioner failed to present any evidence to establish that the reason was

false, much less establish that discrimination was the real reason she was discharged. Lacking any evidence of pretext, she has chosen to ignore the substantial evidence the respondents have presented and claim the Fourth Circuit reached its decision without reviewing any portion of the record other than the brief submitted by the respondents. In fact, before arriving at its decision, the Fourth Circuit secured the entire court record from the District Court so that it could review the depositions and the other evidence cited by the parties in their briefs that was not included in the Joint Appendix..

II. ALTHOUGH THE FOURTH CIRCUIT'S OPINION REGARDING PETITIONER'S §1983 CLAIM MAY ARGUABLY BE CONTRARY TO ITS PRIOR OPINIONS, THE PETITIONER NEVERTHELESS RECEIVED FULL CONSIDERATION OF HER SEX DISCRIMINATION CLAIM UNDER THE SAME

STANDARDS THAT WOULD HAVE BEEN UTILIZED TO CONSIDER HER §1983 CLAIM.

In a footnote to its decision, the Fourth Circuit indicated that the petitioner could not bring an action under §1983 for violation of her 14th Amendment rights because Hughes originally could have instituted a Title VII cause of action. Arguably, the opinions of some other federal circuits, and the Fourth Circuit's own opinion in Keller v. Prince George's County, 827 F.2d 952 (4th Cir. 1991), hold that the Plaintiff may under certain circumstances maintain a §1983 claim even though an accompanying Title VII claim has been dismissed. In Beardsley v. Webb, 30 F.3d 524 (4th Cir. 1994), the same court held that the Civil Rights Act of 1991 that allows recovery of damages and provides for trial by jury under Title VII does not mean that the plaintiff's claims under §1983 are thereby precluded. However, even if we assume that the Fourth Circuit's opinion is in error (and possibly a mere

oversight), no harm was done to the petitioner. Nevertheless, the Fourth Circuit went on to apply the appropriate standards of proof applicable to sex discrimination claims brought under §1983 or Title VII as enunciated by the Court in McDonald Douglas Corp. v. Green, 411 U.S. 792 (1973) and Burdine, supra. See App. to Petition, pp. 15A-21A. The Fourth Circuit went on to properly apply the standards developed in Title VII litigation which are the same standards that are applied under §1983. See Beardsley, supra; and St. Mary's Honor Center, supra, at 415, footnote 1.

III. THE OPINION BELOW DOES NOT CONFLICT WITH THE OPINION OF THIS COURT IN PRICE WATERHOUSE V. HOPKINS, 490 U.S. 228 (1989), SINCE THE FOURTH CIRCUIT CORRECTLY APPLIED MT. HEALTHY CITY SCHOOL DIST. BOARD OF EDUCATION V. DOYLE, 429 U.S. 274 (1977), AND THIS COURT CONSIDERS THE

STANDARD OF PROOF IN BOTH CASES TO BE ESSENTIALLY THE SAME.

The respondents hope that they are not the only ones that are uncertain as to what the petitioner is attempting to argue here. First, the petitioner should be precluded from making this argument because she did not raise this claim in the court below. The District Court based its decision upon the standards established in Mt. Healthy, which among other things included the "substantial" or "motivating factor" test, and the petitioner did not raise this issue before the Fourth Circuit.

If this Court should nevertheless consider this reason as a potential basis for appeal, it should note that the Fourth Circuit correctly applied the Mt. Healthy standards in finding that the petitioner had failed to prove that her speech was a substantial or motivating factor in Sheriff Bedsole's decision to discharge her. The petitioner's only evidence, the temporal connection and the lesser punishment of the male sergeant, was

simply not sufficient in light of the significant evidence presented by the respondents to the contrary. In Price Waterhouse, this Court concluded that the "substantial" or "motivating factor" standard is essentially the same as the "but-for" cause standard established by the court in that case. In correctly applying the law in Mt. Healthy, the Fourth Circuit in effect followed this Court's decision in Price Waterhouse. As the respondents have already indicated, the Fourth Circuit relied on admissible evidence rather than the oral argument of counsel, and such reliance is clearly reflected in the Court's written opinion.

IV. THE OPINION BELOW CONTAINS AN AMPLE EXPLANATION OF THE EVIDENCE UPON WHICH THE FOURTH CIRCUIT FOUND PETITIONER'S EVIDENCE OF DISPARATE TREATMENT INADEQUATE, AND THUS THE FOURTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY OTHER

CIRCUIT COURT DECISIONS.

The petitioner has apparently overlooked the evidence cited by the Fourth Circuit in its opinion. See App. to Petition, pp. 19A-20A. This evidence consists primarily of similar lenient treatment received by a female staff sergeant, and the differences between the security violations Hughes was involved in and other security violations that occurred on a male sergeant's shift. The petitioner acknowledged that she would take the blame for the door being unlocked, and that the unlocked door had "slipped [her] mind", thus indicating that she was aware that the door had been left unlocked. On the contrary, Sgt. Park in his deposition (which was before the District Court and the Fourth Circuit) indicated that he had no prior knowledge that any door was unlocked. Sgt. Park did not accept blame or fault for a door being discovered unlocked.

Based on this evidence, the Fourth Circuit concluded that the petitioner failed to produce evidence that the specific

factual circumstances surrounding her security violations, as well as her overall performance at the time, were substantially similar to those of Sgt. Park whom she claims received more favorable treatment. This represents a proper application of the evidence and law within the Fourth Circuit and other federal circuits.

CONCLUSION

This case does not include any important statutory or Constitutional issues. Rather, this case includes questionable claims that should not have been pursued beyond the discovery stage due to lack of evidence. There is no need for this Court to protect the rights of a local government employee to pursue a cause of action under 42 U.S.C. §1983 (in the absence of a Title VII claim), since virtually all of the federal circuits, including the Fourth Circuit, have concluded that such a right exists under appropriate circumstances. Once again, this Court should take note that the petitioner's claim of sex

Circuit pursuant to appropriate standards, albeit not under the purview of §1983.

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CERTIFICATE OF SERVICE

I certify that pursuant to counsel instructions, I mailed by certified mail, return receipt requested original and forty (40) copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari to the Clerk's Office of the Supreme Court of the United States, and mailed three (3) copies to counsel of record for the Petitioner, Robert J. Willis, Post Office Box 1269, Raleigh, NC 27602, on September 1, 1995.

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